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Academic Speech in the Post-*Garcetti* Environment

Robert M. O'Neil

ACADEMIC SPEECH IN THE POST-*GARCETTI* ENVIRONMENT

ROBERT M. O'NEIL*

The speech of government employees has been, for nearly the past half century, a contentious topic in the public sector and a fertile source of constitutional litigation. Hardly a term of the United States Supreme Court has passed without a further refinement of, or nuance upon, a doctrine that remains remarkably unsettled. Since the central focus of this symposium is precisely that topic, it affords a welcome opportunity to revisit issues of long-standing and keen interest. For one who wrote two editions of the American Civil Liberties Union's Handbook of the Rights of Public Employees,[1] the invitation to return to the subject was irresistible. Even more appropriately, the central theme of this scholarly compendium is the Supreme Court's recent decision in a case[2] in which the Thomas Jefferson Center for the Protection of Free Expression filed an *amicus curiae* brief.[3] Thus, an invitation to contribute to this symposium represented an offer this author could hardly decline.

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* Founding Director, Thomas Jefferson Center for the Protection of Free Expression and President Emeritus, University of Virginia. Keynote speaker for the First Amendment Law Review's 2008 Symposium, "Public Citizens, Public Servants: Free Speech in the Post-*Garcetti* Workplace."

1. ROBERT M. O'NEIL, THE RIGHTS OF GOVERNMENT EMPLOYEES: THE BASIC ACLU GUIDE TO A GOVERNMENT EMPLOYEE'S RIGHTS (1978); and ROBERT M. O'NEIL, THE RIGHTS OF PUBLIC EMPLOYEES: THE BASIC ACLU GUIDE TO THE RIGHTS OF PUBLIC EMPLOYEES (1993).

2. Garcetti v. Ceballos, 547 U.S. 410 (2006).

3. Brief for the Thomas Jefferson Center for Free Expression et al. as *Amici Curiae* Supporting Respondent, Garcetti v. Ceballos, 547 U.S. 410 (2006) No. (04-473), 2005 WL 1801034.

An illustrative starting point is the currently pending case of Professor Juan Hong,[4] who has for two decades taught Chemical Engineering at the University of California-Irvine and has long held tenure there. He has filed suit in federal district court—remarkably, appearing pro se on his own behalf at the trial level. In his complaint, he alleges a novel violation of his free speech and academic freedom. Improbable as Professor Hong may seem as a poster child for the current symposium, his experience starkly illustrates the degree to which the legal principles that now shape academic speech and free expression within the university community have been reshaped following the Supreme Court's recent ruling.

Professor Hong had been denied a merit increase which, under University of California personnel policies, would ordinarily have been essentially routine. Although he had initially requested a postponement of the administrative review of his eligibility for such an increase—apparently anxious to be certain his research productivity met departmental expectations—any dissatisfaction there may have been with his teaching, scholarship or service seemed insufficient to warrant a negative assessment. Surprisingly, what troubled the department chair and the dean had nothing to do with Hong's teaching or scholarship but was instead related to his outspoken criticism of the way in which several recent hiring and promotion decisions in his department had been handled, and his publicly expressed objection to excessive reliance on lecturers (rather than full-time faculty) to teach undergraduates in his discipline. Despite his presumed lack of expertise in legal matters, he presented to the district court a credible First Amendment claim that he had been penalized for speech that any lay person would assume is protected. Before the Supreme Court's 2006 ruling in the *Garcetti* case, that expectation would have seemed fully warranted since such statements on matters of educational policy would surely have been deemed to address "matters of public concern."[5]

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4. Hong v. Grant, 516 F. Supp. 2d 1158 (C.D. Cal. 2007), *appeal docketed*, No. 07-56705 (9th Cir. Nov. 23, 2007).

5. The distinctions which the Supreme Court drew relatively early in *Connick v. Meyers*, 461 U.S. 138 (1983) would until *Garcetti* almost certainly have granted First Amendment protection to a broad range of such statements.

But the district judge would have none of this in the post-*Garcetti* world: "Hong's statements," declared the court in granting the University's motion for summary judgment,

> were made pursuant to his official duties as a faculty member and therefore do not deserve First Amendment protection . . . . While Mr. Hong argues that his statements are of public concern . . . they are more properly characterized as internal administrative disputes which have little or no relevance to the community as a whole.[6]

The unkindest cut of all was yet to come: "UCI is entitled to unfettered discretion when it restricts statements an employee makes on the job and according to his professional responsibilities."[7] It was from this categorical rejection of his constitutional claims that Professor Hong promptly appealed to the Ninth Circuit, where a further ruling is awaited.[8]

Now let me pose two questions central to this Note. First, how did we come to such a sorry state? And second, how might the community of government employees who are concerned about freedom of expression best reduce the risks of a recurrence of such adverse judgments? This Note seeks to address those questions by retracing briefly the surprisingly obscure origins of current public employee free-speech law, including several largely unnoticed anomalies that might have warned a close observer of potential dilution of that protection in later years.

One is always struck by how recent judicial recognition of any First Amendment protection for public employee speech has been. The great Oliver Wendell Holmes did not always have it right, and this area turns out to be one of his least enlightened. In 1893, as a Massachusetts Supreme Court Justice, he wrote of a New Bedford deputy named

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6. *Hong*, 516 F. Supp. 2d 1158, at 1168-69.

7. *Id.* at 1168.

8. *Amicus Curiae* Brief of The Thomas Jefferson Center for the Protection of Free Expression and the American Association of University Professors; the Brief may be found at http://www.tjcenter.org/legal.

McAuliffe who had been fired for taking part in a campaign rally: "[He] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[9] At that time there were "rights" which claimed constitutional protection, and in contrast there were "privileges" which did not.[10] This distinction would prove remarkably durable, and would profoundly affect (though extending well beyond) the speech of government workers.[11]

The persistence of the *McAuliffe* doctrine is striking.[12] When the case of outspoken school teacher Marvin Pickering came before the Illinois Supreme Court three quarters of a century later, the governing law had changed little. "A teacher who displays disrespect toward the Board of Education," wrote the justices in Springfield, "is not promoting the best interests of his school, and the Board . . . does not abuse its discretion in dismissing him."[13] It was, of course, Pickering's case that would profoundly redefine the expressive rights of public employees. In reversing the Illinois court's disparaging view of public employee speech, the majority declared[14] that such expression claimed the same measure of First Amendment protection as the justices four years earlier conferred on the news media in *The New York Times* libel case.[15]

Yet before nostalgia overcomes us, one should recall the many qualifications that Justice Marshall and his colleagues imposed on the *Pickering* doctrine from the outset. For starters, such protection afforded

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9. McAuliffe v. Mayor Etc., City of New Bedford, 29 N.E. 517, 517 (Mass. 1892).

10. *See generally* ROBERT M. O'NEIL, THE PRICE OF DEPENDENCY: CIVIL LIBERTIES IN THE WELFARE STATE (1970).

11. *See generally* Anuj C. Desai, *The Transformation of Statutes into Constitutional Law: How Early Post Office Policy Shaped Modern First Amendment Doctrine*, 58 HASTINGS L.J. 671 (2007).

12. *See* Adler v. Bd. of Educ., 342 U.S. 485, 492 (1952) (holding that teachers "have the right under our law to assemble, speak, think and believe as they will . . . . [T]hey have no right to work for the State in the school system on their own terms.").

13. Pickering v. Bd. of Educ., 225 N.E.2d 1, 6-7 (Ill. 1967).

14. Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

15. New York Times Co. v. Sullivan, 376 U.S. 254, 292 (1964) (holding that the First Amendment protects even false and defamatory statements about a public official from civil liability absent proof of actual malice).

no solace to speech that did not address "matters of public concern"[16]—implying an exception, soon to be made explicit, for a public employee's airing of personal grievances or gripes. If the speaker took an unreasonable amount of time away from his or her assigned responsibilities, protection might also be lost even though the subject matter was well within the scope of "public concern." Moreover, the *Pickering* Court cautioned that a government worker's speech—even on what were unmistakably matters of public concern—might forfeit protection if it caused disruption or impaired morale within the agency. And if speech (even when addressing issues of public importance) might lose its First Amendment status if it diminished or seriously undermined the confidence of those who dealt with or depended upon the agency, that is simply the result of another stated *Pickering* intimation.[17] Perhaps too obvious to deserve mention, though identified in *Pickering* as yet another qualification, public employee speech that revealed the speaker's "incompetence" was also unentitled to such protection.[18] Finally, if the subject matter of the sanctioned speech could have been addressed through administrative channels by following an established grievance procedure, the same result would follow.[19]

In short, despite its immense importance in establishing partial protection for public employee speech where none had previously existed, *Pickering* nonetheless stopped well short of equating a government worker's expressive interests with those of a general citizen. Or, to paraphrase slightly, a government worker enjoyed substantially fewer speech protections *vis-à-vis* his employer than he could claim against his nation, state, or locality.

Barely noted at the time was a prophetic disclaimer about the potential scope of the *Pickering* doctrine. In summarizing the rationale for protecting a teacher's highly critical statements about school board priorities, Justice Marshall noted that the case was vastly different from one where "a teacher has carelessly made false statements about matters so closely related to the day-to-day operations of the schools that any

16. *Id.* at 281-82 (quoting Coleman v. MacLennan, 98 P. 281, 285 (Kan. 1908)).

17. *Pickering*, 391 U.S. at 570 n.4 and accompanying text.

18. *See id.* at 573 n.5.

19. *See id.* at 572 n.4.

harmful impact on the public would be difficult to counter because of the teacher's presumed greater access to the real facts."[20] The Court had earlier derived substantial comfort from noting that "Pickering's letter was greeted by everyone but its main target, the Board, with massive apathy and total disbelief."[21] The import of these observations should have been, but was not, fully apparent at the time: unsettling, even erroneous, public employee speech most clearly claims protection when it comes from someone who lacks expertise on the subject at hand, and whose views would therefore be "greeted . . . with massive apathy."[22] When the speaker is more knowledgeable, a higher degree of accuracy (and perhaps restraint as well) could be demanded by the agency.

This strongly implied inverse correlation between expertise and protection might reflect either of two rationales, neither wholly comforting to public employee speech advocates. The more benign theory, validated by later rulings, was that *Pickering's* main thrust was to protect the outspoken government worker when talking or writing "as a citizen."[23] The other explanation, which lay dormant for nearly four decades, was potentially far more troubling: that *Pickering* protection really only availed public employees when they spoke about matters that were remote from their assigned tasks and responsibilities. This latter theory surely fits the facts of *Pickering*, involving, as *Pickering* did, a critic who lacked any but the most rudimentary knowledge of school board priorities. This more ominous explanation also fits the logic of *Pickering,* given the Court's strong suggestion that a teacher might constitutionally have been dismissed had he written about matters of which he had knowledge—or, comparably, that a member of the school board staff who understood the numbers would not have been reinstated under comparable conditions.

One element of the equation may, however, help to explain the lack of alarm on this point at the time of the *Pickering* decision. It was clear, and the Court recognized, that some of Pickering's critical

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20. *Id.* at 572.

21. *Id.* at 570.

22. *Id.*

23. *E.g.*, Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977); Connick v. Myers, 461 U.S. 138 (1983); Rankin v. McPherson, 483 U.S. 378 (1987).

statements were factually incorrect—a quality on which the school board had relied in dismissing him. Specifically, his letter substantially overstated the amounts spent by the board for athletic programs. To the Supreme Court, recalling and now extending the *New York Times* libel ruling by analogy, it was these erroneous statements that really deserved discussion, since the Court assumed (though the school board and the state courts did not) that "comments on matters of public concern that are substantially correct"[24] would not warrant dismissal, even "if they are sufficiently critical in tone."[25] Thus Justice Marshall's understandable focus on the erroneous parts of Pickering's letter may have been addressed to the school board's understandable concern about the impact on the community of such incorrect charges by a teacher. Under that theory, the implied inverse nexus between expertise and protection—the notion that public employees could claim protection only for speaking about matters on which they were utterly ignorant—could be viewed as less potentially troubling than a skeptic with perfect foresight might have anticipated. But we should tuck it away as we fast forward to more recent developments. Before doing so, there are a couple of other loose ends that need to be analyzed along the way.

The initial euphoria generated by *Pickering* would also prove premature for quite different reasons, beyond the stated exceptions and qualifications. Not surprisingly, the threshold requirement that, in order to claim any First Amendment protection, speech must address "matters of public concern" turned out to be far more problematic than a quick reading of Justice Marshall's opinion might have suggested—or than the Justice himself anticipated. Government workers would eventually learn just how perilous that distinction could be from a case in which the censorious prosecutor was none other than Harry Connick, Sr., who notes with pride that he and his more famous son have pursued quite different careers.[26] An assistant district attorney was disciplined after she circulated within the office a questionnaire that sought the views of her colleagues on several sensitive matters. For the majority in *Connick*, all but one of the questions represented essentially personal grievances and not matters of public concern—even though one might have seen

24. *Pickering*, 391 U.S. at 570.
25. *Id.*
26. *See Connick*, 461 U.S. 138 (1983).

inquiries about office morale and the need for a grievance committee as raising issues of public concern. The sole question that met the majority's "public concern" test asked whether fellow prosecutors ever felt constrained to work on political campaigns of office-supported candidates. Justice Brennan, writing for four dissenters, charged that the majority had shown "extreme deference to the employer's judgment"[27] and had drastically narrowed the scope of the "public concern" standard as articulated in *Pickering* and intervening cases. Equally troubling was the frailty of the distinction between the "personal grievance" questions and the one that did (in the majority's view) address a matter of public concern. Yet the die had been cast, and the Court would consistently reaffirm *Connick*'s distinction in myriad other settings.[28] Once again, closer observers ought to have viewed with far greater alarm so substantial a modification of *Pickering*'s basic protection, and particularly the dilution of the "public concern" test in a case that, after all, involved the speech not of low-level laborers or technicians but rather of attorneys who enjoyed substantial discretion and responsibility in the prosecution of criminal charges.[29] Ironically, it was precisely that context in which the most drastic threat to public employee speech would occur a quarter century later.

Connick's other ominous feature—heightened deference to the judgments of public employers in controlling the speech of subordinates—would also receive significant endorsement in later cases. Most notably, in *Waters v. Churchill*,[30] the Supreme Court decided that in the event of a dispute between agency head and subordinate as to whether a contentious statement actually had been made, then in the concurring view of Justice O'Connor, "courts look to the facts as the employer *reasonably* found them to be."[31] In the intervening years, other qualifications and limitations were identified. For example, that certain government employees held positions of such trust and confidence that they ought not to be afforded the same latitude in their public statements as *Pickering* afforded to junior staff members. Yet by the end of the

27. *Id.* at 168.
28. *See, e.g.*, Branti v. Finkel, 445 U.S. 507 (1980).
29. *See Connick*, 461 U.S. at 140 (1983).
30. 511 U.S. 661 (1994).
31. *Id.* at 677.

century, there could be little doubt that the government employee of 2000 was vastly freer to speak publicly than not only the hapless New Bedford policeman of a century earlier, but even the agency professional of the mid 1960s—for whom, before *Pickering* and its progeny, protection came only through contract or occasionally protective state law. Now all that was about to change, as the Supreme Court agreed to revisit the issue of "job relatedness" that had barely surfaced in *Pickering*, and had been dormant during the ensuing nearly four decades.

Since other articles in this symposium amply describe the circumstances of the *Garcetti* case and summarize the opinions of both majority and dissent, time would not be well spent in duplicating that analysis here. It may be useful, however, and not clearly duplicative, to note how novel was the doctrine that became the majority's central premise—that speech on job-related matters could never claim *Pickering* protection since it did not meet the "public concern" test.[32] This issue had been considered by most federal appeals courts during the preceding decade or so. Without exception those courts reached the same conclusion as the Ninth Circuit majority in the case of Mr. Ceballos—that job-relatedness did not necessarily or automatically disqualify a public employee from pressing a valid First Amendment claim.[33] The consistency of these other circuits was remarkable; one would find concurrent views in cases from the Fifth,[34] Sixth,[35] Seventh,[36] Eighth,[37]

32. Garcetti v. Ceballos, 547 U.S. 410, 423-24 (2006).

33. Ceballos v. Garcetti, 361 F.3d 1168, 1174-75 (9th Cir. 2004) *rev'd*, 547 U.S. 410 (2006).

34. *See* Branton v. City of Dallas, 272 F.3d 730, 743 (5th Cir. 2001) (holding that a police officer's work-related speech was protected under the First Amendment).

35. *See* Taylor v. Keith, 338 F.3d 639, 639 (6th Cir. 2003) (holding that a police officer and police sergeant who filed a Use of Force Report against a fellow officer were protected under the First Amendment).

36. *See* Delgado v. Jones, 282 F.3d 511, 520 (7th Cir. 2002) (holding that a police detective's work-related memorandum was subject to First Amendment protection).

37. *See* Belk v. City of Eldon, 228 F.3d 872, 882 (8th Cir. 2000) (holding that a city employee's workplace speech was protected by the First Amendment).

Tenth,[38] and Eleventh[39] Circuits. In those circuits that had not addressed the issue, there was no evidence of a contrary view.

In the Fourth Circuit, closest to home, the dominant view was unmistakable despite some unfortunate language in the *Urofsky* (Virginia Internet restriction) decision.[40] In fact, the clearest statement came in a 2003 ruling that favored an Albemarle County, Virginia, police officer named Mansoor who had spoken out on matters strikingly similar to those that had sent Mr. Ceballos to "freeway therapy" as the penalty for his public criticism of agency practice and policy.[41] The Fourth Circuit's response to the county's claim could not have been clearer: "[M]atters relating to your employment clearly *can* encompass matters of public concern."[42] Since the Thomas Jefferson Center for the Protection of Free Expression had filed the only amicus brief supporting Officer Mansoor, this ruling had special import in preparing a submission for the *Garcetti* appeal. To anyone who views this precedent as aberrational, reference might be made to a wholly compatible Fourth Circuit ruling three years earlier in favor of a University of Maryland Professor named Kariotis, who had been sanctioned for publicly criticizing the planned consolidation of certain extension units with College Park campus departments.[43] So, when Judge O'Scanlain penned his dissent in the case of Mr. Ceballos, he was charting a wholly novel course, lacking precedent elsewhere within the federal court system.

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38. *See* Dill v. City of Edmond, 155 F.3d 1193, 1205 (10th Cir. 1998) (holding that a police officer's speech was protected under the First Amendment, even when it involved his refusal to write a false report and writing a letter to Chief of Police regarding a convicted murderer he believed to be innocent).

39. *See* Fikes v. City of Daphne, 79 F.3d 1079 (11th Cir. 1996) (holding that the First Amendment rights of a police officer who reported incidents that involved his fellow officers were violated when the City terminated his employment).

40. *See* Urofksy v. Gilmore, 216 F.3d 401, 407 (4th Cir. 2000) (stating that "[an] employee may speak as a citizen on a matter of public concern at the workplace, and may speak as an employee away from the workplace).

41. Mansoor v. Trank, 319 F.3d 133 (4th Cir. 2003) (holding that a police officer who openly criticized department policies was protected by the First Amendment from retaliation).

42. *Id.* at 138.

43. *See* Kariotis v. Glendening, 229 F.3d 1142 (4th Cir. 2000), *available at* 2000 U.S. App. LEXIS 28685 (4th Cir. Sept. 6, 2000).

One further point should be made, even though it may seem obvious to close observers of the field. Despite the confusion created by the Supreme Court's *Connick* ruling, lower courts generally continued to differentiate between personal grievances, or disputes that were clearly not "matters of public concern," and expressions of concern that were not necessarily unrelated to the speaker's expertise (indeed sometimes drew upon that expertise) but addressed broader interests of importance to the community at large.[44] What disentitled statements of the former type to *Pickering* protection was not their job-relatedness, but rather the absence of a broader concern of potential importance to the general public.[45] Significantly, despite its lack of clarity in other respects, *Connick* itself strongly reinforced precisely that distinction. The questions found not to address matters of public concern were "mere extensions of [the speaker's] dispute over her transfer to another section," which "did not seek to inform the public" of potential malfeasance within the agency and "would convey no information at all other than the fact that a single employee is upset with the status quo."[46] Moreover, there seemed to be no difference in regard to job-relatedness between the ten "personal" questions and the one "public concern" inquiry.[47] Thus even a highly pessimistic reading of *Connick* would have afforded no basis for anticipating that job-relatedness would somehow supply the crucial desideratum for public employee speech protection. As for the contested statements made by Mr. Ceballos, there would seem little doubt, as the Ninth Circuit majority recognized, that they did address matters of broad public concern about the policies and practices of the District Attorney's Office and not the details of a dispute between a single assistant district attorney and his superior. Like others who filed in support of Mr. Ceballos and his free-speech claim, we concluded the relevant section of our brief by reminding the reader that the point just made was precisely what the Ninth Circuit majority had ruled in vindicating Mr. Ceballos.

Yet at this stage of the litigation, we realized there was cause for alarm—and that gets closer to the "how did this happen?" inquiry posed earlier. For one, there would have been no occasion to grant certiorari to

44. *E.g.*, *Mansoor*, 319 F.3d 133 (4th Cir. 2003).
45. *See* Connick v. Myers, 461 U.S. 138, 146 (1983).
46. *Id.* at 148.
47. *Id.* at 149.

this rather routine case unless a majority of the justices were ready to adopt the O'Scanlain view; given the recent history and current status of public employee speech protection, there simply was no conflict among circuits of a type one would normally expect as the catalyst for Supreme Court review of an issue in which the justices had previously shown not the slightest interest. Second, the recent erosion we have noted in First Amendment rights of public employees—albeit not with respect to this or even a closely analogous issue—warranted concern when the *Ceballos* case suddenly appeared on the Supreme Court's docket. Third, there was the highly visible dissent from a Ninth Circuit judge whose views would likely command attention from a substantial subset of the justices. Fourth, a gradual Supreme Court shift in their locating the always elusive line between "rights" and "privileges"—going back at least to the ruling in *Rust v. Sullivan*[48] a decade and a half earlier—suggested that public employee speech (which had never been unqualifiedly on the "rights" side of that line) might now be a prime candidate for relocation. Of greatest concern to the Thomas Jefferson Center and the American Association of University Professors was a special anxiety that an O'Scanlain-driven reversal could cause havoc within the academic community for reasons to be explored more fully *infra*.

Finally, there was, or at least should have been, a lingering doubt created by the factual posture of *Pickering* itself. As we noted earlier, the negative correlation between expertise and protection might have left the impression that the Illinois teacher prevailed only because his letter "was greeted . . . with massive apathy and total disbelief"[49] because he lacked "access to the real facts."[50] Although job-relatedness had never been invoked during the ensuing four decades as a basis for denying or diluting protection for a public employee's speech, the potential for such a drastic change should have been far clearer than it was.

Whatever its causes, the consequences of this development have already been dramatic. Last summer our Center was asked to consider filing in support of a dismissed prison guard, whose fate would surely have been different under pre-*Garcetti* public employee speech standards. Under those standards, there would have been little doubt

48. 500 U.S. 173 (1991).
49. *Pickering*, 391 U.S. at 570.
50. *Id.* at 572.

that, although the policies she criticized were not wholly irrelevant to her assigned duties, her public protest could hardly be deemed the airing of a personal grievance. Yet, the district court in that case simply found a relationship between the suspect statements and her assigned job responsibility, and that essentially ended the inquiry.[51]

Were this ruling unique or even unusual, that would be one thing. However, the view espoused by the court in *Spiegla* seems to have dominated the field in the past year and a half. Most federal courts of appeals have taken a fairly expansive view of "official duties" and accordingly, more often than not, have denied recourse to outspoken public employees. For example, a 2007 Tenth Circuit decision interpreted "official duties" broadly enough to encompass speech that "stemmed from . . . the type of activities [a public employee is] paid to do."[52] Adding insult to injury, the Fifth Circuit warned in passing that "reliance on *Pickering* is now inapposite."[53]

The Fifth,[54] Seventh,[55] Ninth,[56] and Eleventh[57] Circuits have taken a similarly expansive view of the *Garcetti* standard in comparable cases. While each of these courts has reached this conclusion by a slightly different route—for example, in the Seventh Circuit "general responsibilit[ies]" equate to "official dut[ies];"[58] in the Tenth Circuit activities "stemming from" or "similar to" are official duties;[59] and in the Eleventh Circuit "official duties" include an obligation to report fraud[60]—the result has been surprisingly and distressingly uniform.

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51. Spiegla v. Hull, 371 F.3d 928 (7th Cir. 2004), *vacated*, 481 F.3d 961 (7th Cir. 2007) *en banc.*

52. Green v. Bd. of County Comm'rs, 472 F.3d 794, 800-01 (10th Cir. 2007).

53. Williams v. Dallas Indep. Sch. Dist., 480 F.3d 689, 692 (5th Cir. 2007).

54. *Id.* at 694 (holding that writing of a memoranda inquiring about budgetary concerns was part of official duties, though not specifically required).

55. *See, e.g.*, *Spiegla*, 481 F.3d at 967 (holding that plaintiff's conduct was within official duties for reporting a possible security issue).

56. *See, e.g.*, Freitag v. Ayers, 468 F.3d 528, 546 (9th Cir. 2006) (holding that plaintiff's reporting of prison inmate misconduct was within official duties).

57. *See, e.g.*, Battle v. Bd. of Regents, 468 F.3d 755, 761 (11th Cir. 2006) (holding plaintiff's reporting of possible wrongdoing in financial aid system comprised official duties).

58. *Spiegla*, 481 F.3d at 966.

59. Green v. County Bd. of Comm'rs, 472 F.3d 794 (10th Cir. 2007).

60. *Battle*, 468 F.3d at 755.

In several of these cases, minor exceptions or aberrations have offered slight hope for the limited survival of *Pickering* principles, despite what seems to be emerging as a contrary pattern. Our own Fourth Circuit seems to have provided one of the very few bright spots. Of the three relevant cases that have reached the Court of Appeals, two provide at least some hope for a more cautious application of the *Garcetti* doctrine.[61] One of these cases avails little since it declined to follow *Garcetti* because the aggrieved party turned out to be more an independent contractor than an employee[62]—suggesting that *Garcetti*'s dilution of government workers' speech need not also undermine the comparable safeguards which the Supreme Court conferred on non-employee contractors in the twin rulings of the mid-1990s in *Board of County Commissioners v. Umbehr* [63]and *O'Hare Truck Services Inc. v. The City of Northlake.*[64] The Fourth Circuit's assumption that *Garcetti* does not extend to independent contractors seems to me a most welcome implied limitation that may merit further discussion in light of still-evolving post-*Garcetti* case law.

Another recent Fourth Circuit ruling is probably the most promising to date. In reviewing sanctions imposed on a public school teacher for posting religious materials on a classroom bulletin board, the appeals panel cautioned that the Supreme Court had expressly reserved the question "whether this [*Garcetti*] analysis would apply in the same manner to a case involving speech related to teaching."[65] Accordingly, "we continue to apply the *Pickering-Connick* standard . . . to this appeal."[66] That ruling is apparently the only clear recognition to date of the limiting language of *Garcetti*—perhaps because this seems to be about the only case involving a teacher to reach the appellate level. One recent Eleventh Circuit case did involve a non-academic university staff member; the court can be forgiven for not noting a caution that clearly

61. Braswell v. Haywood Reg'l Med. Ctr. 234 F. App'x 47 (4th Cir. 2007); Lee v. York County, 484 F.3d 687 (4th Cir. 2007).

62. *Braswell*, 234 F. App'x. 47.

63. 518 U.S. 668 (1996).

64. 518 U.S. 712 (1996).

65. *Lee*, 484 F.3d at 695 n.11.

66. *Id.*

applies to a university professor and, at least in the Fourth Circuit's view, also to a secondary school teacher.

Given this decidedly mixed picture, it may be none too early to raise our second question: what is to be done to reduce the damage potentially created by the *Garcetti* doctrine? A rather close and useful analogy might be drawn to the Supreme Court's equally startling decision in *Rust v. Sullivan*.[67] There, the justices held that federal funding for family planning clinics may constitutionally be conditioned on clinic staff members' agreement not to counsel abortion or even to offer alternatives to pregnant patients. Interestingly, the *Rust* majority opinion contained a caveat closely analogous to *Garcetti*'s concluding reservation: "we have recognized," wrote Chief Justice Rehnquist,

> that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.[68]

Post-*Rust* litigation involving academic issues took full advantage of that cautionary language, and with considerable success. Only a few months after the Supreme Court had spoken, a federal district judge distinguished from the abortion-counseling ban a mandate that some NIH-supported research scientists seek agency approval before publishing or otherwise publicly discussing preliminary research results.[69] Most basic to this court, the NIH restriction imposed a prior restraint on scientific expression, which would presumably have been vulnerable even in a non-academic setting. Finally, there was no evidence in federal funding of university-based research of an assumption implicit in the *Rust* ruling—that Congress simply would not have funded such activity at all had it believed (or been told by a court) it

67. 500 U.S. 173 (1991).

68. *Id.* at 200 (citing Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

69. Bd. of Tr. of Leland Stanford Univ. v. Sullivan, 773 F. Supp. 472, 475-76 (D.D.C. 1991).

could not impose conditions such as those that were eventually challenged.

The post-*Rust* litigation strategy may offer another, and quite different, lesson of value for the First Amendment community today. In situations where governmental restrictions or conditions could not be characterized as "following the money" in the Title X Clinic sense, their constitutionality remained subject to much more rigorous scrutiny.[70] Within a few years, the Supreme Court would sharply confine the *Rust* analysis to situations where government was seeking to convey an official message through private speakers[71]—in contrast to funding programs that were designed to "encourage [diverse viewpoints among] private speakers."[72] Typically in the former context, government created communication channels for the purpose of conveying its message, while in the latter situation, government simply supported the expressive activity of pre-existing entities and media for various purposes, "encouraging diverse viewpoints" prominent among them.[73] While the analogy admittedly is imperfect, *Garcetti* may invite a comparable process of distinction and limitation. One could differentiate, for example, between workplace situations in which government control of the employee's message is integral to the agency's responsibility for management of the workplace and those in which such government power or control is incidental to performance of the tasks and functions of the workplace. Although no court appears yet to have embraced such a distinction, few, if any, cases to which it might apply have emerged in

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70. *See, e.g.*, Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001) (striking down a restriction on the Legal Services Corporation proscribing litigation postures challenging the constitutionality of welfare allocations. Unlike *Rust*, the government was not promoting its own message; rather, it was funding the provision of professional services.).

71. *See, e.g.*, Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 833 (1995) ("When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.").

72. *See id.* at 834 ("It does not follow . . . that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.").

73. *Id.* at 847 (O'Connor, J., concurring).

the year and a half since *Garcetti*. The setting in which such an approach might most effectively mitigate government speech restriction would, of course, be that of the university campus, to which we now turn. In so doing, we return at length to Professor Hong and a case that would seem a prime prospect for a *Garcetti* dispensation.

The academic speech context seems unique for several reasons. Most obvious among them is Justice Kennedy's explicit reservation of that issue in his *Garcetti* opinion. Noting that "expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence," the majority found no need to "decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching." [74]

The Court's declared rationale for deferring that issue in fact sharply understates the importance of its prior treatment of academic speech. Time and again, in cases involving legislative inquiries,[75] loyalty oaths,[76] challenges to admissions actions,[77] and the myriad other government constraints and intrusions,[78] the justices have consistently recognized the distinctive (indeed unique) nature of the university setting and have paid unusual deference to the faculties who govern the policies of institutions of higher learning.

If academic judgments on such matters as these are entitled to an exceptional level of judicial deference, as clearly they are, then the case for protecting speech like that of Professor Hong seems even more clear,

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74. Garcetti v. Ceballos, 547 U.S. 410, 425 (2006).

75. *See, e.g.*, Sweezy v. New Hampshire, 354 U.S. 234, 235 (1957) (finding a due process violation in legislative inquiry in "subversive activities").

76. Keyishian v. Bd. of Regents, 385 U.S. 589, 603-04 (1967) (striking down legislative requirement that university employees certify that they were not communists, in part because of the special nature of universities).

77. Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding limited use of race in law school admissions based upon faculty assertion of need for such action).

78. *See, e.g.*, for evidence of such deference, Regents of the Univ. of Michigan v. Ewing, 474 U.S. 214 (1985) (upholding dismissal of medical student despite his assertion of a due process violation. The faculty's decision "was made conscientiously and with careful deliberation, based on an evaluation of the entirety of [Ewing's] academic career . . .").

in substantial part for the very reasons the *Garcetti* majority invoked in diluting the protections available to the general run of government workers. When it comes, for example, to "official duties," the clarity with which a court can determine the responsibilities of an assistant district attorney (or for that matter a non-faculty university employee like the outspoken Georgia financial aid counselor) simply does not apply to college professors.

Sources for so basic a distinction are not hard to find. When the Supreme Court ruled in 1980 that the National Labor Relations Board lacked jurisdiction over faculties at research universities, it reminded us how fundamentally different are the roles and responsibilities of that group from those of the rest of the workforce. In fact, the *Yeshiva* opinion noted that "the faculty . . . exercise authority which in any other context unquestionably would be managerial," adding that "[t]heir authority in academic matters is absolute."[79]

To the extent that an industrial analogy helped at all, said the *Yeshiva* majority, "the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served."[80] Other contexts provide reinforcing statements. To cite just one very different example, a Sixth Circuit ruling that upheld against administrative sanction a state university professor's autonomy with respect to the evaluation and grading of student performance conveyed comparable recognition of the uniqueness of the professorial role.[81] In such a setting, any effort to define the "official duties" of a college teacher seems perilous at best and meaningless at worst.

This conclusion is reinforced by reference to several other *Garcetti* factors. The first is almost incidental, but deserves recognition. The "whistle-blower protection laws and labor codes" on which Justice Kennedy relied as viable alternatives to *Pickering* protection for public employees who expose "governmental inefficiency and misconduct"[82] are seldom available to university professors; and accordingly, offer to

79. NLRB v. Yeshiva Univ., 444 U.S. 672, 686 (1980).
80. *Id.*
81. Parate v. Isibor, 868 F.2d 821, 827 (6th Cir. 1989).
82. Garcetti v. Ceballos, 547 U.S. 410, 425 (2006).

faculty members little or no recourse parallel to what they promise for most of the government workforce.

A close reading of *Garcetti* yields other, more basic, asymmetries. Any suggestion that state university professors could, like others who work for government, be subject to "managerial discipline" because of statements unwelcome to superiors or contrary to agency policy would be wholly at variance with the most basic standards of academic freedom. Equally troubling, the crucial determination of an employee's "official duties" involves a judgment that is anathema to the academic setting. In *Garcetti*, the critical task defined by the majority opinion was to assess what Ceballos, "as a calendar deputy, was employed to do."[83] Though a concluding paragraph cautioned against overly rigid reliance on "an employee's written job description,"[84] the *Garcetti* majority left no doubt of its focus on such factors in defining the crucial term "official duties." The preferred source of guidance in defining "official duties," said Justice Kennedy, should be "the duties an employee actually is expected to perform."[85]

Such language simply underscores the inapplicability of the *Garcetti* template to professorial speech. Not only is there no readily available source from which to deduce Professor Hong's "official duties," much less is there any public (or even private) document that might determine whether critiquing candidates for faculty positions or faulting his department's over-reliance on part-time faculty fell within his "official duties." Had Professor Hong been, at the time, either a member of the department's personnel committee or of its curriculum committee, one might have suggested that the suspect statements fell within his "official duties,"[86] but such was not the case. Nor should the scope of basic constitutional safeguards for free speech turn upon such ephemeral circumstances. Thus the very factors to which the *Garcetti*

83. *Id.* at 421.

84. *Id.* at 424-25.

85. *Id.*

86. *Cf.* Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 413 (1979) (holding that a teacher who complained to principal about racial composition of school staff was protected in part because that speech was not part of her official duties).

majority directed attention serve to underscore the inappropriateness of the resulting standard for issues of professorial speech.

There is another, quite different, concern about cases like that of Professor Hong. Should an "official duties" concept somehow be applied to faculty speech, despite the obstacles just noted, a bizarre result would follow. Professors would, in effect, be able to speak freely only about matters that are remote from their academic disciplines and expertise, while being denied such protection when speaking or writing within that realm. Professor Hong, in short, might have been free to castigate the quality of fare in the faculty dining room, or the timing of the campus bus service, but not to express with impunity his highly informed views on the quality of prospective academic appointments or the staffing of lower division courses. Such a perverse application of *Garcetti*'s notion of "official duties" would effectively deprive the larger community, as well as the academic world, of that information and expertise which university professors are best equipped to derive from their scholarship and research within their academic disciplines.

While academic freedom undeniably protects those who teach and conduct research, it equally ensures that the public, including lawmakers and courts, will receive from academic experts the very best counsel and insight, uninhibited by concerns about potential legal liability or risk of possible sanction. If the only conditions under which complete candor may be expected of scholarly witnesses are those about which a professor is largely ignorant, we will have come to a sorry state indeed. Thus an extension of *Garcetti* to university professors would not only disserve the core values of academic freedom, but would also dramatically disserve the public interest.[87]

We might conclude this analysis by recognizing an inescapable dilemma. Pressing the special needs and interests of university faculty, as seems appropriate in cases like Professor Hong's, could have the perverse effect of enshrining the *Garcetti* standard across the public workforce while uniquely exempting professors. Courts that review free

87. *See generally* O'NEIL, ACADEMIC FREEDOM IN THE WIRED WORLD: POLITICAL EXTREMISM, CORPORATE POWER AND THE UNIVERSITY 58-59 (2008) (arguing that universities must be free to remain receptive to all opinions and that protecting academic freedom demands a high tolerance for unorthodox and even bizarre or aberrant views).

speech claims of non-academic personnel, even on college campuses, might be comforted by such an exception, and even less inclined in non-faculty cases to consider any other dispensation or exemption. Thus, the argument might run, we should under-play the case for academic speech while continuing to seek broader mitigation.

For several reasons, we should reject such a suggestion, well-intended though it clearly is. For one, both majority and dissenting opinions in *Garcetti* expressly noted the special case of academic speech—a distinction of which courts do not need amici or the parties to remind them. Moreover, any success First Amendment advocates may have in modifying *Garcetti's* impact would not likely be diminished or undermined by effective pursuit of professorial claims. Indeed, a strong defense of people like Professor Hong might even embolden skeptical courts to entertain graver doubts about a broad reading of *Garcetti*. Finally, a close analysis of the inappropriateness of *Garcetti* in academic speech cases may ultimately aid the cause of limiting or confining its reach even as applied to the broader public workforce—at least that is a hopeful prospect at this early and uncertain stage.